COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES/
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

RE: MEMORANDUM OF AGREEMENT REGARDING JURISDICTION OVER POLE ATTACHMENT AND DOUBLE POLE DISPUTES	)	No Docket No.

WRITTEN COMMENTS OF NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.

Introduction

The New England Cable and Telecommunications Association, Inc. ("NECTA") is a nonprofit corporation and trade association that represents the interests of most cable television operators in the six-state New England region. In Massachusetts, NECTA helps coordinate member company efforts with respect to disputes over rates, terms and conditions for pole and conduit attachments under G.L. c. 166A, § 25A and 220 CMR 45.00, as well as underlying federal law in 47 U.S.C. § 224. NECTA has represented member companies in numerous pole and conduit-related regulatory proceedings before the predecessor agencies to the current Department of Public Utilities ("DPU") and Department of Telecommunications and Cable ("DTC").[1]

[1] See, e.g., Docket DTE 98-52, Complaint and Request for Hearing-A-R Cable Services, Inc. v. Massachusetts Electric Company; Docket DTE 98-36, Rulemaking to Establish Complaint and Enforcement Procedures to Ensure that Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of-Way as Required by Section 224 of the Telecommunications Act of 1996, rev'd in part sub nom Greater Boston Real Estate Board v. Department of Telecommunications and Energy, 438 Mass. 197 (2002); Docket DPU/DTE 97-82, Complaint and Request for Hearing of the Cablevision of Boston Company Pursuant to G.L. Chapter 166, § 25A and 220 CMR 45.04 of the Department's Procedural Rules Seeking Relief From Unlawful and Unreasonable Pole Attachment Fees, Terms and Conditions Imposed on Complainants by Boston Edison Company; Docket DPU 91-218, Greater Media, Inc.

In response to the July 18, 2008 joint DPU/DTC notice soliciting written comments ("Notice"), NECTA supports, with relatively limited changes, the proposed Memorandum of Agreement ("MOA") between the DPU and DTC to share jurisdiction over pole and conduit attachments and double poles. This jurisdictional issue was left unresolved in the 2007 legislation (the "Act") that separated the functions of the former Department of Telecommunications and Energy ("DTE") into the DPU and the DTC.[2] The MOA appropriately recognizes that access to solely and jointly-owned utility poles and conduit; the rates, terms and conditions of attachments to poles and conduit; and issues relating to double poles all require a process for determining the adjudicating agency for a given dispute and an opportunity for the other agency to participate, if appropriate. The "primary purpose of the attachment" approach adopted in the MOA is a reasonable means of determining the appropriate agency to adjudicate pole and conduit attachment complaints.

Comments

I. THE MOA SUPPORTS COMPETITION IN ALL INDUSTRIES BY FACILITATING TIMELY RESOLUTION OF OUTSIDE PLANT ACCESS DISPUTES.

NECTA generally supports the MOA as adopting a reasonable approach to allocating adjudication responsibilities, establishing consultation processes for hard cases, and providing intervention opportunities for the agency not assigned to adjudicate a particular dispute. NECTA commends the DPU and DTC for working through the issues relative to pole and conduit attachments and double poles over the past year since enactment of the Act and formulating a detailed governing MOA. As noted in the 220

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[2] Notice, p. 1; see St. 2007, c. 19.

CMR 45.00 rules, the Commonwealth supports a "legislative policy in favor of competition and consumer choice in telecommunications by providing for complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access" to utility poles "with rates, terms and conditions that are just and reasonable."[3] Facilities-based service providers and competitors in all industries that seek to use or attach to utility poles and conduits must have a clear and reasonable procedural mechanism for securing agency review of disputes.

Access to poles and conduit are particularly critical issues for virtually all communications providers, including both cable companies and incumbent local exchange carriers with the rates, terms and conditions applicable to their nearly ubiquitous existing attachments and requirements for extensions into new or previously unserved areas; fiber carriers building new networks; telecommunications providers needing plant extensions to provide high capacity services to new commercial customers; and wireless service providers seeking to identify lawful and safe locations that do not create interference issues with services offered by existing providers. While attachment access issues have not been prominent in an electric industry context, trends towards advanced customer metering systems and other "smart grid" and the potential for merchant transmission projects to relieve congestion in high cost load pockets may lead to future disputes that need timely and decisive resolution. Accordingly, a failure of the DPU and DTC to allocate their respective responsibilities could have led to delays, costs and uncertainties that would have harmed the interests of all competitive providers, utility pole owners and, ultimately, consumers.

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[3] 220 CMR 45.01.

II. THE "PRIMARY PURPOSE" RULE IS A SOUND MANNER OF ALLOCATING JURISDICTION OVER DISPUTES AND NECESSITATES A CHANGE TO BROAD EXCEPTION LANGUAGE IN PARAGRAPH 5.

The "primary purpose of the attachment" approach to assigning responsibility to the DPU or DTC (see MOA at paragraphs 3-5) is reasonable, accords with compelling policy grounds, and should be retained in the executed MOA. This approach has the benefit of assigning attachment issues involving communications facilities to the communications expert agency, and attachment issues involving electric or gas facilities to the energy expert agency. Irrespective of the particular decision maker, parties seeking relief before the agency designated by the MOA retain the ability to offer all factual and legal arguments available under state and federal law.

NECTA is, however, concerned with the breadth of exception language in paragraph 5 of the MOA that, unless modified, will contravene the common sense policies underlying the primary purpose approach and require costly and inefficient piecemeal litigation of telecommunications disputes. The second paragraph within paragraph 5 of the MOA reads in full as follows (with emphasis added):

> Notwithstanding an attachment's primary purpose, <u>any attachment</u> which involves or requires <u>attaching to, using, or drawing from any wire or device that transmits electricity</u>, including any attachment for the purpose of transmission of intelligence over electric power lines, or any attachment that affects or could affect the provision of electric smart grid or advanced metering, whether on poles, underground, at substations, or between the poles and the customer's electric meter, shall be under the jurisdiction of DPU.

The underlined portion – essentially, that <u>all</u> disputes over any electric-powered telecommunications devices or attachments must be adjudicated before the DPU – is overbroad and will unnecessarily complicate resolution of telecommunications disputes.

Cable and telecommunications networks may utilize network components that "use" or "draw" electric power. Wireless attachments may do the same. Assigning exclusive jurisdiction to the DPU over all such equipment will (1) deprive the DTC of jurisdiction over disputes within its core expertise involving telecommunications devices located within the telecommunications space on the poles and conduit; and (2) likely will cause inefficient splits of regulatory jurisdiction over telecommunications networks disputes.

As an example of the former problem, under the primary purpose approach, an attacher complaining that the incumbent local exchange carrier is imposing unreasonable or discriminatory terms and conditions on its equipment located in the telecommunications space at the bottom of the pole would pursue relief at the DTC. The DTC would be familiar with the parties and the technical and policy issues associated with telecommunications attachments, and would be well positioned to render judgments that balance incumbent and competitor needs and the public interest in fostering telecommunications competition. Under the underlined text in paragraph 5, however, the mere fact that the attacher equipment in question draws electric power would compel this telecommunications dispute to be filed with and decided by the DPU.

As an example of the latter problem, some cable companies pay an attachment fee to the pole owners for certain electric-powered equipment used to help operate the network. If the cable company files a telecommunications attachment rate proceeding with the DTC under the "primary purpose" rule, its filing could not include the calculation of the rate applicable to the network equipment, even if the rate was the same as the rate for each ordinary pole attachment. Thus, the entire rate case and all supporting testimony that had been filed with the DTC would have to be also filed with the DPU to

determine rate for attachment for perhaps a few hundred – or a few dozen or even a relative handful of – network boxes simply because they "draw" electricity from a source on the pole or in the conduit. This duplicative, costly and wasteful second litigation should be avoided by amending the "notwithstanding" text in paragraph 5.

Consequently, NECTA recommends that the catch all underlined section be deleted as overbroad and inconsistent with the salutary policies underlying the "primary purpose" rule.[4] Alternatively, the broad underlined portion of the "notwithstanding" exception should be narrowed to disputes over electric safety issues associated with telecommunications attachments that use or draw upon electricity.

III. THE COLLABORATIVE FORUM SHOULD BE RECONSIDERED OR SUBSTANTIALLY DELAYED.

NECTA does not understand the purpose of a "collaborative forum with interested stakeholders to address pole attachment and double pole issues" that would start two months after the execution of the MOA, as provided in paragraph 11 of the MOA. The MOA does not explain why it is necessary and NECTA is not aware of any contentious inter-industry disputes involving outside plant that might justify the need for discussion, let alone disputes that would require use of an outside "facilitator." Absent an explanation of why such an effort and associated time, resource and budgetary commitments are truly necessary on the part of both Departments and all potentially interested parties, NECTA opposes this proposal as a "solution in search of a problem" and recommends its deletion from the MOA. The DPU and DTC should instead allow

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[4] The revised text could read as follows:

> Notwithstanding an attachment's primary purpose, any attachment for the purpose of transmission of intelligence over electric power lines or any attachment that affects or could affect the provision of electric smart grid or advanced metering, whether on poles, underground, at substations, or between the poles and the customer's electric meter, shall be under the jurisdiction of DPU.

the MOA to operate as intended for its two year term and any extensions and convene a collaborative forum only if issues arise that would clearly benefit from such a non-adjudicative approach.

Alternatively, at a minimum, any collaborative forum should commence towards the end of the MOA's initial two year term. The DPU, DTC and interested parties should have at least a year of experience with how well the MOA operates in practice before commencing any formal discussions. The need for a 12-18 month period is especially appropriate given that the communications industry could well face new outside plant issues under the about-to-be enacted Massachusetts Broadband Fund legislation and the electric industry is about to experience significant changes associated with just-enacted Green Communities Act and the just-issued DPU 07-50 decoupling order. Armed with some experience with these and other pending legal and policy changes, the Departments and the parties would have more information with which to decide if the MOA should be made permanent or, alternatively, if changes may be appropriate.

IV. OTHER ISSUES

A. The MOA Should Address Internet Services Expressly.

NECTA recommends that "Internet" be added to the services that are included within DTC jurisdiction in the MOA (at paragraph 4). It likely falls within the "any other communications services" text, but clarification would help avoid future disputes.

B. Agency Intervention Rights Should Be Clarified.

NECTA assumes that the agency intervention right created in paragraph 9 of the MOA is intended to confer party status with full participation rights, as opposed to a limited participant status with rights only to be served with pleadings and participate only

via motions and briefs.[5] The nature of agency intervention rights should be clarified in the MOA to avoid ambiguity.

Conclusion

NECTA commends the DPU and DTC for working out an MOA that will help ensure that critical disputes over rates, terms and conditions over pole and conduit attachments and double pole disputes be resolved expeditiously and before the agency with the appropriate subject matter expertise. The MOA should be modified in several respects, including that (1) the paragraph 5 text granting DPU exclusive jurisdiction over telecommunications equipment that draws upon or uses electricity should be deleted or limited to electrical safety disputes; (2) the collaborative forum established in paragraph 11 should be reconsidered or at least delayed for 12-18 months; (3) Internet services should be expressly incorporated into the paragraph 4 list of communications services subject to DTC jurisdiction, and (4) agency intervention rights in paragraph 9 should be clarified. Subject to these changes and clarifications, NECTA strongly supports the MOA.

Respectfully yours,

NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.

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[5] Compare 220 CMR 1.03(2), 1.03(1)(e) (party status) with 220 CMR 1.03(1)(e) (limited participant status).

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